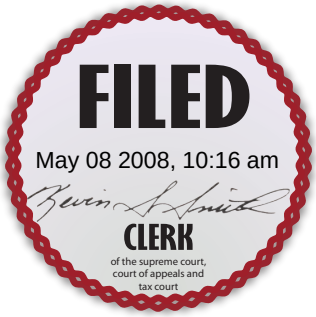

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IN THE
COURT OF APPEALS OF INDIANA

DANYELLE MONTGOMERY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0710-CR-565
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0707-CM-138444

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Danyelle Montgomery appeals her conviction for class B misdemeanor disorderly conduct. We affirm.

Issues

Montgomery raises two issues, which we restate as follows:

I. Whether the evidence is sufficient to support her conviction; and

II. Whether her conviction violates her state constitutional right to free speech.

Facts and Procedural History

The evidence most favorable to the judgment follows. On July 12, 2007, Cumberland police officer Michael Davidson was patrolling the apartment complex of 621 Washington Point Place in Marion County. He noticed that Montgomery was driving at a high rate of speed, failed to use her turn signal, and had no plate light. After Montgomery parked straddling a handicapped spot and a regular parking spot, he pulled up behind her vehicle and turned on an alley light. He informed her that she needed to get her plate light fixed and asked her to move her car because she was inappropriately parked.

Montgomery became very loud and angry. Tr. at 7. She told Officer Davidson that he "could not be there to bother her. That [he] should just leave." *Id*. She was "[s]creaming, not at the top of her lungs but screaming." *Id*. Officer Davidson asked her to calm down, but she continued to yell. He attempted to explain to her that he was just giving her a warning to fix her plate light and use her turn signal and was not going to write her a ticket. She screamed that "[he] was harassing her [and had] stopped her because she was black." *Id*.

Officer Davidson decided to conduct an actual traffic stop, and he asked Montgomery for her driver's license and registration. She screamed that he did not need to know who she was and she was not going to give him anything. After he informed her that he could place her in custody if she refused, she complied.

As Officer Davidson verified Montgomery's information in his vehicle, he observed her speaking on her cell phone. He stepped out of his vehicle and asked her to please remain off the telephone during the traffic stop. She refused to end the phone call, saying that she was a grown woman and could talk on the phone if she wanted to.

At that time, "people started to come out onto their balconies to see what was going on." *Id*. at 9. Four people came out of their apartments and asked Officer Davidson if everything was all right. Officer Davidson continued to ask Montgomery to quiet down and stop yelling. Finally, Officer Davidson arrested her and confiscated her cell phone.

On July 13, 2007, the State charged Montgomery with disorderly conduct. Following a bench trial, the trial court found Montgomery guilty as charged on September 11, 2007. Montgomery appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Montgomery argues that the evidence is insufficient to support her conviction. In reviewing a claim of insufficient evidence, we consider only the evidence most favorable to the judgment and all reasonable inferences that support the judgment. *Hubbard v. State*, 719 N.E.2d 1219, 1220 (Ind. 1999). The factfinder is responsible for weighing the evidence and judging the credibility of witnesses, and we do not impinge upon this task on appeal. *O'Neal*

v. State, 716 N.E.2d 82, 87 (Ind. Ct. App. 1999), *trans. denied.* If the factfinder heard evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt, we must affirm a conviction. *Graham v. State*, 713 N.E.2d 309, 311 (Ind. Ct. App. 1999), *trans. denied*.

To convict Montgomery of disorderly conduct, the State was required to prove beyond a reasonable doubt that she recklessly, knowingly, or intentionally made unreasonable noise and continued to do so after being asked to stop. *See* Ind. Code § 35-45-1-3; Appellant's App. at 12. The harm criminalized under this statute is the harm that flows from the volume of noise. *Johnson v. State*, 719 N.E.2d 445, 448 (Ind. Ct. App. 1999). Unreasonable noise is "decibels of sound that were too *loud* for the circumstances." *Whittington v. State*, 669 N.E.2d 1363, 1367 (Ind. 1996) (emphasis in original).

> Loud noise could be found unreasonable [] on a number of grounds. It could threaten the safety of injured parties by aggravating their trauma or by distracting the medical personnel tending them. Loud outbursts could agitate witnesses and disrupt police investigations. It could make coordination of investigations and medical treatment more difficult. Finally, loud noise can be quite annoying to others present at the scene.

Id.

Montgomery contends that the State failed to prove that the noise she created was unreasonable, that is, too loud for the circumstances.[1] We disagree.

Here, in a residential apartment complex late on a weekday evening, Officer Davidson approached Montgomery intending merely to warn her that her plate light was not operating

and to ask her to move her car. Montgomery immediately began yelling at Officer Davidson and continued to do so.[2] The evidence shows that Officer Davidson spoke politely and respectfully to Montgomery in a normal voice. Officer Davidson had to interrupt his check of Montgomery's identification to ask her to refrain from speaking on her cell phone during the traffic stop.[3] Montgomery's screaming drew apartment residents out onto their balconies, and four residents approached and questioned Officer Davidson. He was hampered in his efforts to determine Montgomery's identity. We conclude that there was sufficient evidence establishing that Montgomery's persistent yelling was too loud for the circumstances.[4]

II. Right to Free Speech

Montgomery asserts that her speech is protected under Article 1, Section 9 of the Indiana Constitution, which provides, "No law shall be passed, restraining the free

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[1] Montgomery states that, "[a] conviction will not be upheld where the harm suffered never rose above the level of a 'fleeting annoyance.' " Appellant's Br. at 8 (quoting *Price v. State*, 622 N.E.2d 954, 964 (Ind. 1993). The language from *Price* relates to whether political speech was an abuse of the right to free speech. While Montgomery raises a separate argument that her conviction must be reversed because her speech was political, the language she relies on from *Price* is inapplicable to the issue she raises here.

[2] Montgomery's assertion that Officer Davidson testified that she was not screaming at the top of her lungs is irrelevant. *See Johnson*, 719 N.E.2d at 448 (holding that Johnson's noise was unreasonable where he "argued in a voice louder than the voices of others in the room[,]" thereby preventing police officers from asking questions to resolve situation and noting that "it makes no difference that Johnson was not yelling or screaming.").

[3] We observe that it is not illegal to talk on a cell phone during an ID check.

[4] Montgomery asserts that her voice was not unreasonable for the circumstances because she believed that Officer Davidson was harassing her because she was black. Montgomery does not cite any evidence, nor does our review of the record before us reveal any, that would provide an objective basis to find that Officer Davidson was harassing Montgomery because she was black. In any event, a defendant whose noise level is unreasonable for the circumstances falls within the ambit of Indiana Code Section 35-45-1-3. In *Blackman v. State*, the defendant argued that she was justified in raising her voice because she was "being treated like an animal and being talked down to[.]" 868 N.E.2d 579, 584 (Ind. Ct. App. 2007), *trans. denied*. We stated, "While this may be, Black certainly was *not* entitled to raise her voice beyond reasonable levels." *Id*. (emphasis in original).

interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: *but for the abuse of that right, every person shall be responsible*." (Emphasis added.)

> Reviewing the constitutionality of an application of the disorderly conduct statute requires a two-step inquiry. First, a reviewing court must determine whether state action has restricted a claimant's expressive activity. Second, if it has, the court must decide whether the restricted activity constituted an "abuse" of the right to speak.

Whittington, 669 N.E.2d at 1367; *see also Blackman v. State*, 868 N.E.2d 579, 584-85 (Ind. Ct. App. 2007), *trans. denied*; *U.M. v. State*, 827 N.E.2d 1190, 1192 (Ind. Ct. App. 2005); *Johnson v. State*, 747 N.E.2d 623, 629 (Ind. Ct. App. 2001); *Shoultz v. State*, 735 N.E.2d 818, 825 (Ind. Ct. App. 2000); *Johnson*, 719 N.E.2d at 448.

Here, the State restricted Montgomery's expressive activity when she was convicted of disorderly conduct based on her loud talking. *See Johnson*, 719 N.E.2d at 449 (holding that person's conviction for making unreasonable noise based solely on loud speaking during police investigation constitutes state action restricting claimant's expressive activity).

We turn now to whether the restricted activity constituted an "abuse" of the right to speak. *Whittington*, 669 N.E.2d at1367. Where the claimant's expression does not constitute political speech, we apply "rationality review" in determining whether the State could reasonably have concluded that the expressive activity, because of its volume, "was an 'abuse' of the right to speak or was, in other words, a threat to peace, safety and well-being." *Id.* at 1371.

In contrast, if a claimant succeeds in demonstrating that his or her expression was political, the State must demonstrate that it has not materially burdened the claimant's

opportunity to engage in political expression.[5] *Id*.; *Anderson v. State*, 881 N.E.2d 86, 90 (Ind. Ct. App. 2008); *Blackman*, 868 N.E.2d at 585; *U.M.*, 827 N.E.2d at 1192; *Madden v. State*, 786 N.E.2d 1152, 1156 (Ind. Ct. App. 2003), *trans. denied*; *Johnson*, 747 N.E.2d at 630; *Shoultz*, 735 N.E.2d at 825. To show that political expression is not materially burdened–thus constituting an "abuse" of the right to free speech–the State must produce evidence that the speech "inflicted upon determinable parties harm of a gravity analogous to that required under tort law." *Whittington*, 669 N.E.2d at 1370; *see also U.M.*, 827 N.E.2d at 1192 (political speech is not materially burdened if "the speech inflicted particularized harm analogous to tortious injury on readily identifiable private interests."). Mere annoyance or inconvenience is not sufficient. *Blackman*, 868 N.E.2d at 585.

A claimant's expressive activity is political, for purposes of Article 1, Section 9 of the Indiana Constitution, if its point is to comment on government action, including criticism of the conduct of an official acting under color of law. *Shoultz*, 735 N.E.2d at 826. Where an individual's expression focuses on the conduct of a private party, including the speaker himself, it is not political. *Whittington*, 669 N.E.2d at 1370. The nature of the expression is judged by an objective standard, and the burden is on the claimant to demonstrate that his or her expression would have been understood as political. *Blackman*, 868 N.E.2d at 585. If the expression is ambiguous, we must conclude that the speech was non-political. *Id*.

[5] In *J.D. v. State*, 859 N.E.2d 341 (Ind. 2007), our supreme court omitted any discussion of different analyses of "abuse" depending on whether political or non-political speech is at issue. *J.D.* suggests that any exercise of the freedom of speech, whether political or non-political, will be qualified to the same degree by the phrase "but for the abuse of that right, every person shall be responsible." We therefore agree with Judge Kirsch that *J.D.* appears to tacitly overrule *Price*. *See Blackman*, 868 N.E.2d at 588 (Kirsch, J., concurring). Nevertheless, we analyze Montgomery's argument pursuant to established precedent while we await our supreme court's further guidance on this issue.

We think *Blackman* is dispositive. Although the defendant in that case made comments such as "this is unconstitutional[,]" which was recognized as political in nature by the *Blackman* court, the defendant also made statements such as that "she had every right to be there, that she did not have to leave the scene." *Id*. at 585-86. The *Blackman* court therefore concluded, "Blackman's speech was ultimately ambiguous as to whether she was commenting on her own conduct or that of the officers." *Id*. at 586. In reaching that decision, the *Blackman* court observed,

> [W]e are particularly sensitive to attending policy considerations regarding the extent to which police officers must endure the claimant's insults, threats to their personal safety, and the disruption of their investigations, in the name of preserving the claimant's right to free speech.

Id.

Likewise here, Montgomery made some comments that may be construed as directed to Officer Davidson's actions, such as that he "could not be there to bother her [and] should just leave" and "[he] was harassing her [and had] stopped her because she was black." Tr. at 7. However, other comments, such as that she was a grown woman and could talk on the phone if she wanted to, were merely her opinion that she can do what she wants. *See Blackman*, 868 N.E.2d at 586. ("this comment could be construed to reflect nothing more than Blackman's opinion that she can do what she wants when she wants.") (quoting *Johnson*, 719 N.E.2d at 449) (brackets and quotation marks omitted). Accordingly, we find that Montgomery's speech was non-political.

Given that Montgomery's speech was non-political, she may be found to have abused her right to speak if her expressive activity was a threat to peace, safety, and well-being. *See Whittington*, 669 N.E.2d at 1367. The purpose of Officer Davidson's encounter with Montgomery was to protect public health and safety by warning her that her plate light was broken and asking her to properly park her car. Montgomery was loud and uncivil from the beginning of the encounter. Her yelling hampered Officer Davidson's attempts to protect public health and safety. In addition, Montgomery's screaming disturbed apartment residents late on a weekday evening. Four residents were compelled to approach Officer Davidson to inquire about the scene, thereby interrupting his efforts to perform his duties and possibly creating a safety concern. Under these circumstances, Montgomery's speech was a threat to peace, safety, and well-being.

Our supreme court's decision in *J.D. v. State*, 859 N.E.2d 341 (Ind. 2007), supports our decision. In that case, a Marion County deputy sheriff, who worked at the Marion County Guardian's Home to maintain order and enforce rules, attempted to discuss the problems that J.D. was experiencing with the Home's house parent. The officer testified that when she approached J.D., she did not intend to make an arrest but rather hoped to find a satisfactory solution to the problem. However, the efforts of the deputy "to have a conversation with J.D. proved unsuccessful, as louder interruptions from J.D. met each of the officer's attempts to speak to her." *Id*. at 343. The deputy further testified that J.D. responded to requests to stop hollering by stating that she "did not have to respect no one or nobody that didn't respect her." *Id*. (quotation marks omitted). J.D. was adjudicated a

delinquent child for commission of disorderly conduct, a class B misdemeanor if committed by an adult.

Our supreme court upheld J.D.'s adjudication, distinguishing her conduct from that of the defendant in the seminal case of *Price v. State*, 622 N.E.2d 954 (Ind. 1993):

> Here, J.D.'s alleged political speech consisted of persistent loud yelling over and obscuring of Deputy Gibbons's attempts to speak and function as a law enforcement officer. Because it obstructed and interfered with Deputy Gibbons, J.D.'s alleged political speech clearly amounted to an abuse of the right to free speech and thus subjected her to accountability under Section 9.
>
> Because we find that J.D.'s abusive speech is not analogous to the relatively harmless speech in *Price*,[6] and that her loud over-talking of the officer was not constitutionally-protected speech, we reject the claim of insufficient evidence.

J.D., 859 N.E.2d at 344.

Here, Montgomery met all Officer Davidson's requests, instructions, and explanations with screaming. She obstructed and interfered with Officer Davidson's attempt to speak and function as a law enforcement officer. Based on *J.D.*, we conclude that Montgomery's speech was an abuse of the right to free speech. *See also Anderson*, 881 N.E.2d at 91 (holding that defendant's speech obstructed and interfered with officers' attempts to speak and function as law enforcement officers and was therefore an "abuse"). Accordingly, her conviction does not violate Article 1, Section 9 of the Indiana Constitution.

Affirmed.

BARNES, J., and BRADFORD, J., concur.

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[6] In *Price*, the arrest of the defendant occurred after officers encountered a "boisterous knot of quarreling party-goers" on New Year's Eve, and therefore our supreme court found that due to the large numbers of officers and civilians present, the defendant's loud speech did not rise "above the level of a fleeting annoyance" and "the link between her expression and any harm that was suffered" was not established." 622 N.E.2d at 955, 964.